Medical Association [1970] 1 All ER 1094 Lord Pearson at p. 1101 said this:

> A reasonable cause of action means a cause of action with some chance of success, when only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out.

I have examined the statement of claim in the present case and I have given my views as above.

Incidently I note that the prayers of this action appear to me to be substantially within the ambit of paragraphs 15.2 to 21 of the statement of claim.

E. *Conclusions:*

In view of my findings herein above I hereby order that only paragraphs 4 to 15.1 of the statement of claim be struck out. I leave it to the plaintiff to apply for the necessary amendments to the remaining paragraphs of the statement of claim in view of my preceding order. Since the defendants are only partially successful I order that only one-half of the taxed costs be awarded to them in the exercise of my discretion.

Reported by Shamsiah Begum Subhan.

TEO SIAW PENG

v.

PUBLIC PROSECUTOR

HIGH COURT, KUCHING
TUAN RICHARD MALANJUM JC
[CRIMINAL APPEAL NO. KG. 33 OF 1992]
14 APRIL 1993

CRIMINAL LAW: Possession of offensive weapon - Finding of fact - Appeal - Caution statement - Admissibility - First information report - Section 6(1) Corrosive and Explosive Substances and Offensive Weapons Act 1958 - Whether imprisonment sentence mandatory.

On 10 May 1988 at about 8 p.m. the appellant opened the door of the Romantic Karaoke, holding an offensive weapon, to wit a parang or a long knife similar to a samurai sword. PW1 was standing about 10 feet away and the light at the door was bright thus enabling him to see the weapon carried by the appellant.

The learned Magistrate convicted and sentenced the appellant to 5 months imprisonment. The appellant appealed against conviction and sentence.

Held:

[1] An appellate court in the interest of justice can intervene on the findings of fact by a trial court if the findings of the trial court are against the weight of evidence or that the inference drawn could not find support from the primary facts as found.

[2] It can be inferred that the alleged assault by PW6 on the appellant the day before could not have caused any effect on the mental condition of the appellant so as to have made him feel threatened, induced or promised before giving his cautioned statement.

[3] It is settled law that a first information report is not substantive evidence to prove a fact. At most it is of corroborative value. Further, in the present case the first information report was tendered yet no cross-examination of PW1 on the first information report was made by the defence Counsel. No adverse inference should therefore be invoked.

[4] Section 6(1) does not require that an offensive weapon must be used to commit another offence before an offence under it can be said to have been committed. So long as an offensive weapon is carried or in the possession or under the control of a person in a public place or road without lawful authority or purpose an offence has been committed by the person under the said section.

[5] Section 6(1) of the Act does not carry a mandatory imprisonment sentence. In view of the state of mind of the learned trial Magistrate with regard to the imposition of sentence of imprisonment it is doubtful if a similar sentence or length of sentence of imprisonment would have been imposed if she had thought otherwise. The sentence of 5 months is excessive.

[Appeal against conviction dismissed. Appeal against sentence allowed. Sentence passed varied].

Cases referred to:
Jaffar bin Abu & Anor. v. Public Prosecutor [1988] 2 MLJ 363 ***(cit)***
Ismail bin U.K. Abdul Rahman v. Public Prosecutor [1974] 2 MLJ 180 ***(cit)***
Datuk Mokhtar bin Hashim & Anor. v. PP [1983] 2 MLJ 232/[1983] 2 CLJ 10 ***(cit)***
Tan Too Kia v. PP [1980] 2 MLJ 187 ***(cit)***
Lee Look v. PP [1985] 1 MLJ 240 ***(cit)***
Tan Cheng Kooi & Anor. v. PP [1972] 2 MLJ 115 ***(foll)***
J.B. Jeyaratnam v. Law Society of Singapore [1988] 3 MLJ 425 PC/[1988] 2 CLJ 720 ***(foll)***
Public Prosecutor v. Wan Razali Kassim [1970] 2 MLJ 79 ***(foll)***
PP v. Wahab [1964] 30 MLJ 265 ***(foll)***
Jayanathan v. PP [1973] 2 MLJ 68 FC ***(cit)***

Legislation referred to:
Corrosive and Explosive Substances and Offensive Weapons Act 1958, s. 6(1)
Criminal Procedure Code, s. 325
Penal Code, s. 506

For the appellant - Ernest Chua; M/s. Ernest Chua & Co.
For the public prosecutor - Azhahari Kamal bin Ramli, DPP

JUDGMENT

Richard Malanjum JC:
This is an appeal by the appellant against his conviction and sentence on a charge under s. 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 (hereinafter called "the Act"). Upon conviction the learned trial Magistrate sentenced the appellant to 5 months imprisonment.

The relevant facts as found by the learned trial Magistrate are as follows:

(i) On 10 May 1988 at about 8 p.m. the appellant opened the door of the Romantic Karaoke, a public place being accessible to the public, owned by one Lim Thian Aik (PW1) holding an object in his hands.
(ii) The object in the possession of the appellant was an offensive weapon, to wit; a parang or a long knife similar to a Samurai sword (Ex. P. 2)
(iii) PW1 saw the appellant standing at the door as PW1 was about 10 feet away and the light at the door was bright thus enabled PW1 to see the weapon carried by the appellant in particular the red cloth on the weapon.
(iv) Earlier, on the same evening, the appellant and his 2 girlfriends had come to the Romantic Karaoke which ended up in a quarrel between PW1 and the 2 girls and that PW1 scolded the appellant as well.

The learned trial Magistrate also made it clear that she believed the version of the prosecution's witnesses especially PW1 and that the version of the appellant did not cast any reasonable doubt to the prosecution's case.

The grounds of appeal of the appellant against the conviction and sentence as appearing in the petition of appeal are as follows:

1. The Learned Trial Magistrate erred in law and in fact in admitting the cautioned statement of the Accused/appellant after the trial within a trial in that the Learned Trial Magistrate had totally ignored and failed to consider the established legal principle of the rule against bias and the legal principles pertaining to the admissibility or otherwise of a cautioned statement AND failed to take into consideration or at all the evidence of PW7 *vis-a-vis* the conflicting evidence of PW8, PW9 and that of the Accused.
2. The learned Trial Magistrate erred in law and in fact in accepting in totality

the uncorroborated evidence of the complainant, Lim Thian Aik (PW1) contrary to established legal principles on the burden of proof and failing to consider or at all the report from the complainant (PW1) tendered in evidence as exhibit (P1) which report runs counter to PW1's own evidence in relation to the question of who actually appeared at the door of the Romantic Karaoke as the report states that at the material time 4 or 5 Chinese males came to Romantic Karaoke and that one of them was carrying a parang and PW1's own evidence in Court also confirmed that the Accused was with some male friends at the material time.

3. The Learned Trial Magistrate erred in fact in finding that it was the Accused/appellant who was holding the parang based on the sole uncorroborated evidence of PW1 whereas the evidence of DW2 which the Learned Trial Magistrate also accepted, shows that the Accused did not bring anything to the pub and that they left at about 8.00 p.m. Further PW1 under cross examination told the Court that he could not tell how long and how big was the object that the Accused was holding as PW1 was quite a distance away from the door of the pub and that the light inside the pub was dim.
4. The Learned Trial Magistrate erred in law in the interpretation of one of the essential ingredients under s. 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958, on possession or control, contrary to established legal principles governing the law on possession and control.
5. In any event the appellant contends that the conviction by the Learned Trial Magistrate is wrong and that the sentence passed by the Learned Trial Magistrate is excessive in the circumstances and cannot be supported having regards to the evidence as a whole.

(a) *Ground one:*

On this ground it is the main contention of the learned Counsel for the appellant that:

(i) there has been a grave injustice to the appellant in consequence of the learned trial Magistrate failing to give her 'ruling' for her admission of the cautioned statement of the appellant;

(ii) the learned trial Magistrate did not examine with care and at length the conflicting evidence of the witnesses for the prosecution during the trial within the trial resulting in failing to consider the oppressive circumstances which would negate the voluntariness of the appellant when making the cautioned statement; and

(iii) the learned trial Magistrate ignored the rule against bias since the recording officer (PW8) knew the case and had seen the exhibits before recording the cautioned statement of the appellant.

On this issue the learned Deputy Public Prosecutor conceded that there was no ground given by the learned trial Magistrate in coming to her decision to admit the cautioned statement of the appellant. But the learned Deputy Public Prosecutor submitted that the cautioned statement was given voluntarily as found by the learned trial Magistrate. It is further submitted that an Appellate Court can review the evidence given during the trial within a trial and need not set aside the finding of the trial Court. The case of *Jaffar bin Abu & Anor. v. Public Prosecutor* [1988] 2 MLJ 363 is cited which the learned Counsel for the appellant has also referred.

On the point of oppressive circumstance the learned Deputy Public Prosecutor contends that the alleged assault took place 1-2 days before the statement was recorded yet before another Police Officer after the alleged assault the appellant denied the ownership of the weapon. As such he contends that the alleged assault had no effect. The learned Deputy Public Prosecutor also submits that the contents of the cautioned statement are quite in detail thereby indicating the mood of the appellant and that the conflicting evidence should not be a ground to reject the finding of voluntariness.

As for the issue of bias learned Deputy Public Prosecutor argues that the appellant himself had said that the recording officer did not even mention the swords and that the showing of the swords before the recording did not prejudice the appellant. The recording officer has cautioned the appellant before recording his statement. He cites the case of *Ismail bin*

U.K. Abdul Rahman v. Public Prosecutor [1974] 2 MLJ 180 in support of his argument on this issue.

Having considered the submissions of the respective Counsel on this ground of appeal it is beyond dispute that the learned trial Magistrate failed to give her 'ruling' in admitting the cautioned statement of the appellant after finding that it was voluntarily given. It is obvious from her decision to admit the cautioned statement that she found the statement to have been given voluntarily after hearing the evidence of the witnesses called by both parties during the trial within the trial. Thus it is not so much of her not giving her 'ruling', rather the learned trial Magistrate did not give her reasons for her finding on the voluntariness of the statement though she stated to do so earlier on. Here I must state that it is in the interest of justice that a presiding Court should at least indicate in its judgment the aspects of the evidence given at the trial within a trial or at least give the reason why it chose the evidence for the prosecution. There should be some basis for its conclusions, failing which it might occasion a miscarriage of justice if the cautioned statement is admitted to the prejudice of the Accused person. In the present case however, the evidence of the witnesses on the trial within the trial have been recorded and as both learned Counsel agree that I may review the evidence I therefore proceed to do so accordingly. I am aware that in doing so I may indulge in findings of fact while as an appellate Judge. But an Appellate Court in the interest of justice can intervene on the findings of fact by a trial Court if the findings of the trial Court are against the weight of evidence or that the inference drawn could not find support from the primary facts as found.

Basically learned Counsel for the appellant says that the conflicting evidence of the witnesses for the prosecution in the trial within the trial should be examined carefully and if done so one would find the oppressive circumstances which would negate the voluntariness of the cautioned statement. Having examined the evidence in detail there is no doubt that there are discrepancies between the evidence of Inspector Tey Jern Wah (PW6), Sgt. 78549 Minyad ak. Sarie (PW7), Inspector Fung Lee Fook (PW8) and ASP Joseph Jan (PW9). But having considered the discrepancies I do not think much can be made out of them on the issue of voluntariness of the cautioned statement. The learned Counsel for the appellant submits six items which he says to be oppressive circumstances. But the first five circumstances relate to PW6 and the last one relates to the interview of the appellant with PW9. No doubt PW6 saw and interviewed the Appellant at about 4 p.m. on 11 May 1988 and the cautioned statement was recorded by PW8 on 12 May 1988 at about 4.25 p.m. Prior to the recording by PW8 the appellant was interviewed by PW9 and in the words of the Appellant he answered 'no' when he was asked by PW9 if the swords belonged to him and that was all PW9 asked him. Thus, it can be inferred that the alleged assault by PW6 on the appellant the day before could not have caused any effect on the mental condition of the appellant so as to have made him feel threatened, induced or promised before giving his cautioned statement. Learned Counsel for the appellant also said that the appellant spent about 1 hour with PW9 as stated by PW7. But the appellant in his own evidence said that only one question was asked by PW9 which therefore is consistent with what PW9 testified in that the interview only took place for about 5 minutes. Accordingly PW7 may not have been accurate in his recollection of the event and that the alleged interview of 1 hour with PW9 which according to learned Counsel for the appellant constituted an oppressive circumstance, could not have happened.

Learned Counsel also submits that the appellant was not given dinner. But there appears to be no direct evidence on this point even in the cross-examination by the learned Counsel for the appellant during the trial. It may be inferred from the evidence of PW6, Sgt. Terusan ak. Sangau (PW10) and PC Ginjang ak. Dio (PW11) but as I have stated earlier on that the evidence of the appellant on his interview with PW9 before the recording does not support that the lack of food, if correctly inferred, had affected him.

I do not find therefore on the material before me that there was any oppressive circumstance which affected the giving of the cautioned statement by the appellant. The argument of the learned Counsel for the appellant therefore fails.

Next, the learned Counsel for the appellant says that there was a neglect on the rule against bias by the learned trial Magistrate. But having read the cautioned statement I do not find the contents to reflect knowledge acquired prior to the recording, as for instance, from PW6, PW7 or PW9. In fact what appears to have been told to PW6 and elicited by the defence in cross-examination are not consistent with the contents of the cautioned statement. And there is no evidence before me to indicate that PW8 had other sources of prior knowledge of this case as detailed as the contents of the cautioned statement. As to the contention that PW8 saw the swords prior to recording the statement I do not think that such knowledge, if true, is sufficient to constitute bias on the part of PW8 so as to disqualify him from recording the cautioned statement of the appellant.

First, there is no, evidence or submission made to show that such a knowledge has prejudiced the appellant or affected the question of his voluntariness in making the cautioned statement. It is to be noted that the primary question is whether the cautioned statement was given voluntarily. (See: *Datuk Mokhtar bin Hashim & Anor. v. PP* [1983] 2 MLJ 232 and *Tan Too Kia v. PP* [1980] 2 MLJ 187).

Secondly, there is no doubt that PW8 was not the Investigating Officer of this case and would have no personal interest in it. In *Lee Look v. PP* [1985] 1 MLJ 240 the recording officer was also the Investigating Officer in that case. As such, the present case can therefore be distinguished from that case. The fact of knowing or seeing the exhibits whilst at the Police Station in my view should not be a reason to disqualify PW8 in recording the statement. To do so would mean that police officers in the same station would not qualify since one way or another they would know or bound to know of any exhibits obtained. I do not think the law of voluntariness extends that far. Further, I do not think in this case there was a likelihood of bias on the part of PW8 and in my view there is therefore no miscarriage of justice occasioned thereby.

Thirdly, from the contents of the cautioned statement there is nothing to indicate that PW8 had utilised his sight of the exhibits or knowledge of the case when he recorded it. Accordingly, this contention of the learned Counsel for the appellant also fails.

For the above reasons I find no merit on this first ground of appeal.

(b) *Ground two:*

On this ground the complaint of the learned Counsel for the appellant is that the learned trial Magistrate relied on the uncorroborated evidence of PW1 the complainant, that the First Information Report (Ex. P1) was not considered and that there is a doubt on the recognition of the appellant by PW1.

On the question of the acceptance of the uncorroborated evidence of PW1, if true, by the learned trial Magistrate, I find nothing wrong in law in such an exercise. Having heard and seen PW1 in the witness box the learned trial Magistrate was in the best position to assess his credibility. In fact from the judgment given the learned trial Magistrate considered both the version of PW1 and the version of the Defence and she accepted the former. Further; it is not true that the learned trial Magistrate did not look for corroboration. In fact the cautioned statement of the appellant was taken as a corroborative evidence. And in view of my conclusion on the first ground of this appeal the cautioned statement stands as a corroborative evidence of the testimony of PW1. The first complaint therefore fails.

With regard to the issue of failure to consider the First Information Report (Ex. P1) in relation to the evidence of PW1 I can only conclude that this is a misapprehension on the purpose of a First Information Report. It is a settled law that a First Information Report is not a substantive evidence to prove a fact. At most it is of corroborative value. (See: *Tan Cheng Kooi & Anor. v. PP* [1972] 2 MLJ 115). Further, in the present case the First Information Report (Ex. P1) was tendered yet from the Appeal Record I find no cross-examination of PW1 on (Ex. P1) by the learned defence Counsel. No adverse inference should therefore be invoked. In fact the content of (Ex. P1) does not entirely exclude the appellant as the person being in possession of a parang. Further, PW1 did say in his evidence that when he opened the door he saw

the appellant and his friends sitting on the five-foot way. He then telephoned the Police. I find therefore no merit on this complaint as well.

As to the point on recognition of the appellant by PW1 it is clear from the Appeal Record that PW1 was cross-examined by the defence on this issue and PW1 maintained that he saw the appellant with a parang that night. In fact it was also impliedly admitted by defence during the trial when cross-examining PW1 that the appellant was staying next door to the Romantic Karaoke. Further the learned trial Magistrate found it as a fact that it was the appellant who was at the door holding a parang which finding I have no reason to interfere after examining the evidence adduced on the issue.

It is also to be noted that there was a motive for the appellant to return to PW1 after the incident earlier on. Though motive is not an ingredient to an offence it is a factor to consider. As such this complaint fails too.

Accordingly, ground two for the reasons above fails.

(c) *Ground three:*

Having perused this ground I find no merit in it. It is solely on a finding of fact by the learned trial Magistrate and I do not find the learned Counsel for the Appellant having succeeded in showing that the finding is contrary to the evidence adduced or unreasonable in the circumstances. Lord Bridge of Harwich in *J B Jeyaratnam v. Law Society of Singapore* [1988] 3 MLJ 425 PC at p. 433 F-G (left) said this:

> As an appellate Judge who had not seen or heard the witnesses, it was only if he could validly reject the trial Judge's finding of primary fact based on acceptance of witnesses whose evidence he had seen and heard that he the appellate Judge, could substitute his own findings of fact.

In *Public Prosecutor v. Wan Razali Kassim* [1970] 2 MLJ 79 his Lordship Azmi LP at p. 82 H (left) said this:

> An Appellate Court should be slow to interfere with the finding of fact by a lower Court as an Appellate Court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility.

(d) *Ground four:*

On this ground learned Counsel for the appellant contends that there was an error in law in the interpretation of the meaning of 'possession' under the Act by the learned trial Magistrate. But having considered the submission of the learned Counsel for the appellant on this point I am of the view that the dissatisfaction is not so much on the interpretation but on the finding of the learned trial Magistrate based on the evidence adduced that the appellant was in fact in possession, custody and control of a parang at the material time. And that being a finding of fact I do not think this Court being an Appellate Court should interfere without valid reason. I have perused the evidence adduced and recorded in the Appeal Record on this point and I find nothing to indicate that the finding of the learned trial Magistrate is in error or unreasonable. Indeed the learned trial Magistrate accepted the evidence of PW1 and took the cautioned statement of the appellant as the corroborative evidence to the testimony of PW1 on such point. I am of the view that such an exercise is within the law.

It is also submitted by the learned Counsel for the appellant that from the evidence of PW6 there is nothing to show that the appellant used a samurai sword to threaten PW1 and that the alleged sword picked by the appellant from the bush behind his house was not proven to be one of the swords tendered at the trial. As such learned Counsel urges this Court to draw an inference that the appellant never carried an offensive weapon or a sword in a public place.

The contention of the learned Counsel in my view presupposes that the evidence of PW1, the cautioned statement and the incident that took place earlier on that evening are not true or inadmissible as evidence. With respect such an approach cannot be correct. Nothing has also been submitted to support such an approach. In fact from the judgment of the learned trial Magistrate her decision was based on other evidence adduced and expressly excluded the evidence of PW6 as being

statement made by the appellant after his arrest. Thus, even without the benefit of the evidence of PW6 the learned trial Magistrate came to a conclusion as she did. Having read the evidence of PW6 I would think that such evidence could have strengthened the case against the appellant as nothing was adduced to show that the appellant made the statement to PW6 after his arrest. It appears to me that the appellant made the statement which led PW6 to put him under arrest. Anyway, since the learned trial Magistrate came to a finding which in my view, correctly; I do not think it is therefore necessary for me to make any conclusion on the evidence of PW6.

It is also contended by learned Counsel for the appellant that since the appellant was discharged and acquitted on the first charge under s. 506 of the Penal Code it should be taken to be more likely that the appellant never carried a samurai sword or a parang to the Romantic Karaoke at the material time.

This submission in my view is based on a false premise that a conviction or acquittal under s. 506 of the Penal Code must necessarily support a conviction or acquittal under s. 6(1) of the Act. But to my mind the two offences are not inter-dependent. Section 6(1) does not require that an offensive weapon must be used to commit another offence before an offence under it can be said to have been committed. So long as an offensive weapon is carried or in the possession or under the control of a person in a public place or road without lawful authority or purpose an offence has been committed by the person under the said section. I find therefore no merit in the submission.

For the above reasons this ground of appeal fails.

(e) *Ground five:*

This ground appears to me to be a combination of a plain averment that the conviction of the appellant is wrong and an appeal against the sentence being excessive in the circumstance and cannot be supported having regards to the evidence as a whole. No submission has been made by learned Counsel for the appellant on this ground for reason best known to himself. Be that as it may I take this ground as substantially a ground against the sentence passed. Thus, before dealing with it I hereby rule that for the reasons given above I find no reason to interfere with the finding of conviction of the appellant by the learned trial Magistrate and the appeal against conviction must therefore be dismissed. It is of interest to note that before the sentence was passed the appellant in person said that he committed the offence as he was provoked by PW1. There is nothing to indicate from the Appeal Record that he was required to make such a statement.

As for the sentence passed I note that in passing the sentence the learned trial Magistrate has concluded that s. 6(1) of the Act carries a mandatory imprisonment sentence. But on reading s. 6(1) I do not think so as the phrase used is " ... on conviction **be liable to imprisonment** for a term not exceeding two years, and to whipping" (emphasis added). Similar interpretation was also made in the case of *PP v. Wahab* [1964] 30 MLJ 265 by Hashim J. when he said this at p. 266 D-E:

> Now s. 6(1) of the Ordinance states *inter alia* that on conviction be liable to imprisonment for a term not exceeding two years and to whipping. My interpretation of this section is that the term of imprisonment is not mandatory and a fine may be imposed in lieu of imprisonment.

The Ordinance referred in that case was the Corrosive and Explosive Substances and Offensive Weapons Ordinance 1958 which is now the Act after revision. (See also: *Jayanathan v. PP* [1973] 2 MLJ 68 FC).

I am therefore of the view that in passing the sentence the learned trial Magistrate has erred in law which warrants this Court to review the sentence passed.

No doubt the appellant has one previous conviction for robbery in which he was only bound over for 3 years with 2 sureties on appeal. But in view of the state of mind of the learned trial Magistrate with regard to the imposition of sentence of imprisonment I am in doubt if a similar sentence or length of sentence of imprisonment would have been imposed if she had thought otherwise. Thus, having considered the mitigation as recorded in the Appeal Record and the circumstances of this case I

think the sentence of 5 months imprisonment is excessive. I therefore partially allow the appeal against sentence and in case of doubt I also exercise my power of revision under s. 325 of the Criminal Procedure Code by reducing the sentence of imprisonment to 3 months from today since the appellant has been on bail pending the hearing of this appeal.

The appeal against conviction is dismissed but the sentence passed is varied accordingly.

THE HONGKONG AND SHANGHAI BANKING CORPORATION

v.

SYARIKAT UNITED LEONG ENTERPRISE SDN. BHD. & ANOR.

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC
[SUIT NO. T. 275 OF 1987]
15 MAY 1993

CONTRACT: Guarantee - Consideration - Guarantee signed after loan given - Whether past consideration - Whether good consideration for a guarantee; forbearance to sue - Whether constituted further consideration - Whether forbearance established; undue influence - Whether proved - Burden of proof s. 16(2) & (3) Contracts Act 1950 - Whether applicable; failure to appoint receiver - Whether 2nd defendant discharged from guarantee - Section 92 Contracts Act - 2nd defendant agreeing to certain terms - Effect; limit of liability - Whether left blank at time of execution of guarantee - Blank guarantee - Whether guarantee valid.

The 1st defendant, of which the 2nd defendant and his wife were directors, was a customer of the plaintiffs. Loans were given by the plaintiffs to the 1st defendant and were secured by charges and debenture. The 1st defendant was unable to repay the loans as far back as 1983. However, no receiver was appointed, though demanded by the 1st defendant. In June 1985, the plaintiffs demanded payment from the 1st defendant. A guarantee dated 3 October 1986 ('the guarantee') was signed by the 2nd defendant. No money was advanced after the execution of the guarantee.

The plaintiffs sued the defendants for money lent to the 1st defendant and guaranteed by the 2nd defendant.

Judgment upon an O. 14 application was entered against the 1st defendant and its counterclaim dismissed. But the 2nd defendant was granted leave to defend, the Judge concluding that two triable issues, of whether a demand had been made and whether the guarantee was void for lack of consideration, had been raised, and holding three other issues advanced by the 2nd defendant, including those of undue influence and negligence, not triable issues.